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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 512

KONG DIN QUONG,
Petitioner,

vs.

EDWARD L. HAFF, District Director of Immigration and Naturalization for the Port of San Francisco,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit and BRIEF IN SUPPORT THEREOF

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, Kong Din Quong, through his attorneys and counsel, prays the Court to issue a writ of certiorari to bring up the above entitled cause, as it affects your petitioner, for review.

JURISDICTIONAL STATEMENT.

Arriving in the United States from China on November 9, 1938, petitioner, a male of Chinese descent, applied to the immigration authorities for the Port of San Francisco for admission to the United States under a citizenship status, claiming to be the son of Kong Ngok Wah, a citizen of the United States. (Sec. 1993 of Revised Statutes.)

Petitioner was excluded from admission by a Board of Special Inquiry, which was convened at the port, and, upon appeal, the Secretary of Labor, through her Board of Review, affirmed the decision and ordered the deportation of petitioner to China.

While in custody under a warrant of deportation, petitioner filed a petition (Tr. of R. 1-7) for a writ of habeas corpus in the Southern Division of the United States District Court, for the Northern District of California, which had jurisdiction of the proceedings under 28 U.S.C.A. Sections 451-453. The petition was denied. Thereupon, an appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit to Review the District Court's order denying the petition. Jurisdiction is conferred upon the Circuit Court by 28 U.S.C.A. Sections 463 and 225. By opinion rendered May 21, 1940, the Circuit Court affirmed the order of the District Court, the Court, however, having been divided in opinion. (Tr. of R. pp. 30-44.) Petitioner now seeks review of the aforesaid proceedings by this Court, upon which jurisdiction to review the same is conferred by 28 U.S.C.A. Section 347.

FACTS OF THE CASE.

Petitioner claims to have been born in China on December 29, 1921. It is conceded by the immigration authorities that the petitioner's alleged father, Kong Ngok Wah, is a citizen of the United States. It is, also, conceded that the petitioner is the son of Kong Ngok Wah, who was admitted to the United States on May 11, 1921. It is, however, concluded by the immigration authorities that the petitioner is not a citizen of the United States, in that he was born *prior* to May 11, 1921, the time when his father was admitted to the United States. (*Weedin v. Chin Bow,* 274 U. S. 657, 660-675, 47 Sup. Ct. 772, 71 L. Ed. 1284) In reaching their conclusion, the immigration authorities have rejected the claim advanced by and for the petitioner that he was born on December 29, 1921, or approximately seven (7) months *after* his father first arrived in the United States, and have relied upon various opinions expressed by members of the Board of Special Inquiry and by medical officers to the effect that the petitioner is older than seventeen (17) years, which was his claimed age, lacking nineteen (19) days, at the time of his examination before the Board of Special Inquiry on December 10, 1938.

SPECIFICATION OF ERRORS RELIED ON.

Specification of errors relied on in the appeal taken from the order of the District Court, denying the petition for a writ of habeas corpus, to the Circuit Court

of Appeals (Tr. of R. pp. 15-18) are respectfully called to the attention of this Court.

REASON RELIED ON FOR THE GRANTING OF THE PETITION FOR CERTIORARI.

The petition for a writ of certiorari is presented in the interest of uniformity of decision.

Petitioner claims, substantially, that the immigration authorities, in denying him the right of entry under the status of an American citizen, upon the ground that he was born *prior* to the time of the entry of his father into the United States, have acted arbitrarily and unfairly. Whether or not petitioner was born on December 29, 1921, at a time approximating seven months *subsequent* to the time of entry of his father into the United States on May 11, 1921, as claimed by and for him, or was born *prior* to the time of the entry of his father, is manifestly a question involving the age of the petitioner. As to whether or not the action of the immigration authorities, in determining the question of age, is arbitrary and unfair, under facts similar to those existing in the case at bar, the majority opinion of the Circuit Court of Appeals in the case at bar gives rise to a conflict of decisions. In the case at bar, the Circuit Court of Appeals was, itself, divided in opinion and, in our brief annexed hereto, we will endeavor to point out that other decisions, particularly, rendered by the Circuit Court of Appeals for the Ninth Circuit, from which this petition for a writ of certiorari comes, run counter to the majority opinion.

Wherefore, petitioner respectfully prays that this Court will issue a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, in order that the judgment of that Court in this case may be reviewed and corrected.

LAMBERT O'DONNELL,
STEPHEN M. WHITE,
Counsel for Petitioner.

Dated: San Francisco, California, October 15, 1940.

Certificate of Counsel.

The undersigned counsel for petitioner certifies that the above and foregoing petition is not interposed for delay and that, in their opinion, said petition is well founded.

LAMBERT O'DONNELL,
STEPHEN M. WHITE,
Counsel for Petitioner.

Dated: San Francisco, California,
October 15, 1940.

PETITIONER'S

BRIEF

In the Supreme Court of the United States

OCTOBER TERM, 1940

No.....

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Petitioner,

vs.

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Respondent.

BRIEF IN SUPPORT OF PETITION

LAW.

THE PETITIONER, IF BORN SUBSEQUENT TO THE TIME WHEN HIS FATHER WAS FIRST ADMITTED TO THE UNITED STATES, WAS ENTITLED TO ADMISSION UNDER A CITIZENSHIP STATUS.

The Act of Congress of February 10, 1855, 10 Stat. L. 604 (Section 1993 of Revised Statutes), provides:

> "That persons heretofore born, or hereafter to be born out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United

States, shall be deemed and considered and are hereby declared to be citizens of the United States: Provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States."

The case of *Weedin v. Chin Bow,* 274 U. S. 657, 675, 47 Sup. Ct. 772, 71 L. Ed. 1284, decides that a foreign born son of a citizen of the United States must be born *subsequent* to the admission of his father into the United States, in order to be entitled to admission under a citizenship status.

STATEMENT OF PROCEEDINGS.

(a) A petition for a writ of habeas corpus was filed in the District Court for the Northern District of California on April 4, 1939. (Tr. pp. 1-8).

(b) The judgment of the District Court denying the petition for a writ of habeas corpus was filed and entered on June 14, 1939. (Tr. p. 12).

(c) The opinions of the Circuit Court of Appeals, majority and dissenting, were filed on May 21, 1940. (Tr. pp. 30-44).

(d) Petition for rehearing before the Circuit Court of Appeals, respecting which the Court was divided, was denied on July 25, 1940. (Tr. p. 46).

The judgment of the Circuit Court of Appeals in habeas corpus proceedings is a final judgment.

Lau Ow Bew v. United States, 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340, page 344.

STATEMENT OF CASE.

The original immigration records, which were made a part of the proceedings on the hearing for the petition for a writ of habeas corpus, are before this Court as exhibits.

Petitioner claims to have been born in China on December 29, 1921. Arriving in the United States from China on November 9, 1938, he applied to the immigration authorities for the Port of San Francisco for admission to the United States under a citizenship status, claiming to be the son of Kong Ngok Wah, a citizen of the United States. Kong Ngok Wah, the petitioner's father, was, himself, admitted to the United States on May 11, 1921, under a citizenship status, having then established that he was the foreign born son of Gong (Kong) Chee Sow, a native born citizen of the United States.

The petitioner was excluded from admission by a Board of Special Inquiry, which was convened at the port, and, upon appeal, the Secretary of Labor, through her Board of Review, affirmed the decision. The excluding decision was based upon the ground that the petitioner is not a citizen of the United States, in that he was born *prior* to the time when his father was first admitted to the United States.

The facts constituting the foundation upon which the petitioner sought admission to the United States and the ground for the denial of the application by the immigration authorities are set forth in the findings and decision of the Secretary of Labor, through her Board of Review, which we quote as follows:

"This case comes before the Board of Review on appeal from denial of admission as a son of a citizen. The precise question at issue is whether this applicant is of an age which would show him to be entitled to a citizenship status as a son of his alleged father.

Attorney Roger O'Donnell has filed a brief.

Kong Ngok Wah, the alleged father of this applicant, claimed in November, 1925, to have as his second child a son of the name and birthdate alleged by and for this applicant. The alleged father, who was last in China between December, 1925, and December, 1927, and Jung Moy Ho, an alleged aunt of the applicant, who was admitted in March, 1938, have appeared to testify on the applicant's behalf. The testimony is in complete agreement. The applicant is conceded to speak the same rather unusual Far Yuen dialect as his alleged father. Two members of the Board of Special Inquiry have conceded that there is a resemblance between the applicant and his alleged father. Thus, while the said board has not in terms conceded that the applicant is a son of his alleged father, there appears in the record no reason why the concession should not have been made. Thus, the sole question and issue appears to be whether the applicant is of an age which would indicate that he was born prior to his father's arrival in the United States, in which case, under the rule of the Chin Bow decision of the Supreme Court, he would not be entitled to admission as a citizen, or was born subsequent to that date, in which event he would be so entitled.

Kong Ngok Wah, the alleged father, arrived at the port of San Francisco, as an applicant for admission, as a China-born son of a United States native, on April 28, 1921. In the course of the examination, which resulted in his admission, he claimed to have been married and to have a son named Kong Yee Gwong, age 2 years. When in 1925 Kong Ngok Wah made application for a citizen's return certificate, he stated that he had two sons, Kong Yee Gwong, age 6, and Kong Din Gwong, age 5. On his return in 1927 from a trip to China, Kong Ngok Wah claimed three sons, giving for the second the name Kong Din Gwong, which is the name given by and for this applicant, and stated his birthdate to be the Chinese equivalent of December 29, 1921, the birthdate now given by and for this applicant. According to that birthdate that second claimed son would have been almost exactly 17 years of age at the time of this applicant's examination. To the members of the Board of Special Inquiry this applicant appeared to be above the age of 17, the several members of that board expressing the opinion that the applicant is 18, 19 or 20 years old. Thereafter, the applicant was examined by a representative of the Public Health Service who submitted a detailed report of the evidence regarding the applicant's age disclosed by X-ray photography as well as by superficial examination of the applicant's physical development which caused medical officers 'to believe that the applicant is between twenty-one and twenty-three years of age.' Subsequently, opportunity was afforded for the examination of the applicant and the radiographs by a private physician who submitted a state-

ment of his conclusion and the reasons for his conclusion that 'the evidence submitted indicates that the subject in question is about 18 years of age'. Thus, it appears that all of the evidence, expert and lay, agrees that this applicant is above the age of 17 and so is indicated to have been born prior to the time of his alleged father's first arrival in the United States. In view of this evidence as to the applicant's age, it would appear to be established that even though he is in fact a son of his alleged father this applicant is not under the rule of the Chin Bow decision entitled to be admitted as a citizen, which is the only claimed basis of his right to enter into the United States.

* * * * * * *."

(Exhibit "A", pp. 72-71)

ARGUMENT.

THE MEDICAL OPINIONS, PURPORTING TO SHOW THAT THE PETITIONER IS OLDER THAN HIS CLAIMED AGE AND THAT HE WAS BORN PRIOR TO MAY 11, 1921, ARE UNREASONABLE.

The undisputed evidence shows that the petitioner's father, Kong Ngok Wah, was born on September 11, 1902. When Kong Ngok Wah was, himself, an applicant for admission in 1921, he testified as follows:

"Q. When and where were you born?

A. K. S. 28-8-10 (9-11-02) at Ping San Village, Far Yuen District, China." (Exhibit "A", p. 22.)

The evidence further establishes that the petitioner's father, Kong Ngok Wah, married the mother of the petitioner in September, 1919. The testimony of Kong Ngok Wah, adduced in the case of the petitioner before the immigration authorities, was as follows:

"Q. How many times have you been married?
A. Once only.
Q. When and where were you married?
A. C. R. 8—early part of the 8th. month (Sept. 1919) at Ping San Village.
Q. Is this wife the blood mother of the applicant? A. Yes.
Q. Describe your wife.
A. Mock Sum You or Mock Shee, 36, now at Ping San Village, China."

(Exhibit "A", p. 23.)

For the purpose of determining the age of the petitioner, the immigration authorities caused X-ray photographs to be taken of certain bone structures of the petitioner at the United States Marine Hospital, San Francisco, by Dr. E. M. Townsend, roentgenologist. Dr. Townsend made the following observation:

"Determination of age: There are no epiphyseal lines present in the bones that enter into the formation of the elbow joint, the lower end of femur, or upper end of the tibia and fibula. From the X-ray evidence the individual is an adult over 24 years of age. No epiphyseal lines

are noted in any of the films observed, the fusion being complete."

(Exhibit "B", p. 6.)

E. C. Kading, a medical examiner of the United States Public Health Service, at the instance of the immigration authorities, after examining the petitioner as to the condition of hair, skin, development of sexual organs, dentition and relying upon the X-ray report of Dr. Townsend, expressed the following opinion:

"Study and correlation of the above features lead me to believe that the applicant is between 21 and 23 years of age."

(Exhibit "A", pp. 39-40.)

It is conceded that medical opinions expressed as to age are competent evidence. (*Hom Ark v. Carr,* 105 Fed. (2d) 607, 611.) It is, however, submitted that such opinions must be viewed in the light of established facts. In the case at bar, the established facts are:

1. The father of petitioner was born in September, 1902.
2. The mother of the petitioner was born in 1903.
3. The parents of petitioner were married in September, 1919.

The petitioner arrived in the port of San Francisco in November, 1938, and his application for admission was heard in December, 1938, when he was examined

as to age. If he were "an adult over 24 years of age," as stated by Dr. Townsend, he was born in 1914 or prior thereto, at which time his father, having been born in 1902, was 12 years old or less, and his mother, having been born in 1903, was 11 years old or less. If he were between 21 and 23 years old, as stated by Dr. Kading, it would be necessary to find that the petitioner's father was between 13 and 15 years old at the time of petitioner's birth and that his mother was between 12 and 14 years old. It would, also, be necessary to find that the parents were married, assuming, as we must, that the petitioner is a legitimate child, at a time when the father was 11 years old or less and the mother 10 years old or less if the opinion of Dr. Townsend be accepted, and, if the opinion of Dr. Kading be accepted, when the father was between 12 and 14 years old and the mother was between 11 and 13 years old. Moreover, if the petitioner were 21 years old or more in 1938, as stated by the medical examiners, he would have been born in 1917 or prior thereto or, at least, two years prior to the established date of marriage of his parents in September, 1919. The opinions of Dr. Townsend and Dr. Kading, thus, are contrary to the established fact namely, that the petitioner is the legitimate son of his alleged parents, and are countered to normal facts of life, in that the opinions would have the petitioner the offspring of persons, by reason of their own childhood, virtually incapable of parenthood. The unreasonableness and absurdity of the opinions are manifest, as His Honor Judge Garrecht pointed out in his dissenting opinion. (Tr. pp. 40-41.).

As a matter of fact, however, the Secretary of Labor, through her Board of Review, did not find in accordance with the opinions of the medical examiners that the petitioner was 21 years old or more, but merely found that the petitioner was older than his claimed age of 17 years and that he was born prior to May 11, 1921, the date when his father was first admitted to the United States. We submit that the petitioner was entitled to a finding by the immigration authorities, as to his actual or approximate age, in order to ascertain whether or not the age, at which the immigration authorities would estimate the petitioner, is substantially greater than his claimed age. If the difference be only slight, either higher or lower by only one or two years, the estimate would not afford substantial ground to overcome the claimed age.

> *Woo Hoo v. White,* 243 Fed. 541, C.C.A. 9th;
> *Lew Git Cheung v. Nagle,* 36 Fed. (2d) 452, C.C.A. 9th.

The finding of the immigration authorities that the petitioner is older than his claimed age may well mean that the immigration authorities estimate him to be older by only one or two years.

In the case of *Kwock Jan Fat v. White,* 253 U.S. 454, 464, it is said:

> "The acts of Congress give great power to the Secretary of Labor over Chinese Immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tra-

dition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, not less of the commissioner of immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

In the case of *Lew Git Cheung v. Nagle,* supra, Judge Dietrich said:

> "Naturally the value of an opinion of this kind depends upon the circumstances. The age of one of tender years is undoubtedly susceptible to a more accurate and dependable estimate than that of a mature person. Also, if one claims to be of a certain age and the estimate, reasonably based upon his appearance and physical characteristics, is higher or lower not by only one or two but many years, it may have a very substantial weight, *whereas, if the discrepancy is only slight, the estimate would have but little value.* * * *."

The opinions of the medical examiners did not take into consideration the race of the petitioner and the conditions under which he had lived in China.

In his dissenting opinion, His Honor Judge Garrecht said:

> "In the absence of authentic and reliable birth records proof of age is difficult to establish. It is common experience that the appearance of a person is very deceiving in estimating age; some people mature earlier than others; some appear older than they really are, others younger. Then, there seems to be a general suspicion that people are older than they say. This vagueness and uncertainty is augmented in the case of persons of another race, born and reared in another part of the world, subject to a different climate, diet and environment. An order of exclusion based upon a slight difference between the age claimed and the age suspected or guessed at would be unreasonable." (Cases cited)

The views expressed by Judge Garrecht are reiterated in the case of *Chin Ten Teung v. Ward,* 30 Fed. (Supp.) 670, D.C. of Mass. There, it was held that a finding by the immigration authorities that a Chinese boy was older than his claimed age, which finding was based upon opinions of medical examiners, who did not take into consideration his race and the conditions under which he lived was unfair. The same situation exists in the case at bar.

THE OPINIONS OF MEMBERS OF THE BOARD OF SPECIAL INQUIRY AS TO THE AGE OF THE PETITIONER WERE WITHOUT PROBATIVE VALUE AND IT WAS ARBITRARY AND UNFAIR TO BASE AN EXCLUDING DECISION THEREON.

We have endeavored to show that the opinions of the medical examiners were unreasonable and unfair. There remains to be considered the opinions of the members of the Board of Special Inquiry as to the age of the petitioner. Member Sims expressed the opinion that the petitioner was "at least 19 years of age; Member Oberg states that the petitioner is "not younger than 18 years of age, American reckoning, and probably slightly older", the Chairman of the Board gives the opinion that the petitioner is between 19 and 20 years old", Inspector Tompkins expresses the opinion that the petitioner is "18 or 19 years old." (Exhibit "A", pp. 21, 22 and 34) The consensus of opinion among members of the Board of Special Inquiry would, therefore, indicate that the petitioner is about 18 or 19 years old.

In expressing their opinions, the members of the Board of Special Inquiry have relied upon certain characteristics observed in the petitioner, such as his general bearing, his facial expression, the manner in which he answered questions, his demeanor, his attitude and the timber of his voice.

The opinions or conclusions of the members of the board as to the age of the petitioner were of no probative value, in that the same were not based upon

scientific data and an excluding decision based thereon is arbitrary and unfair.

Wong Bing Pon v. Carr, 41 Fed. (2d) 604, C.C.A. 9th;
Woo Hoo v. White, 243 Fed. 541 C.C.A. 9th.

THERE IS NO BASIS FOR HOLDING THAT THE PETITIONER IS THE FIRST BORN SON OF HIS FATHER, RATHER THAN THE SECOND BORN SON AS HE CLAIMS TO BE.

The Court, in its majority opinion, stated that "it might well be that the board believed that the petitioner was in fact the claimed father's first born son" and, in this connection, referred to certain testimony given by an interpreter to the effect that the petitioner gave testimony, when first questioned, in a manner to indicate that he was the first born son, rather than the second born son, as he claims to be. There is nothing certain in the testimony of the interpreter to indicate that the petitioner ever stated that he was the first born son. In any event, the fact remains that there is not the slightest suggestion in the decision of the Secretary of Labor, through her Board of Review, that it was believed that the petitioner was the first born son, although it may be that the Board of Special Inquiry at the port suspicioned that he was the first born son. Inasmuch as the Secretary of Labor did not believe or even comment upon the possibility of the petitioner being the first born son, the matter is deemed of no importance.

In *Young Len Gee v. Nagle,* 53 Fed. (2d) 448, C.C.A. 9th, the Court said:

> "The Board of Special Inquiry based its order of exclusion on still a fourth factor, namely, that of dialect. However, the Secretary of Labor, to whom the appeal was taken, did not comment upon the dialect feature, and relied solely upon the three discrepancies above referred to. We think it may be reasonably presumed that the Secretary of Labor considered the matter of no importance, and chose to rest his decision upon what he considered sounder bases; namely, the three discrepancies. * * * "

A decision by the immigration authorities must be found on substantial evidence.

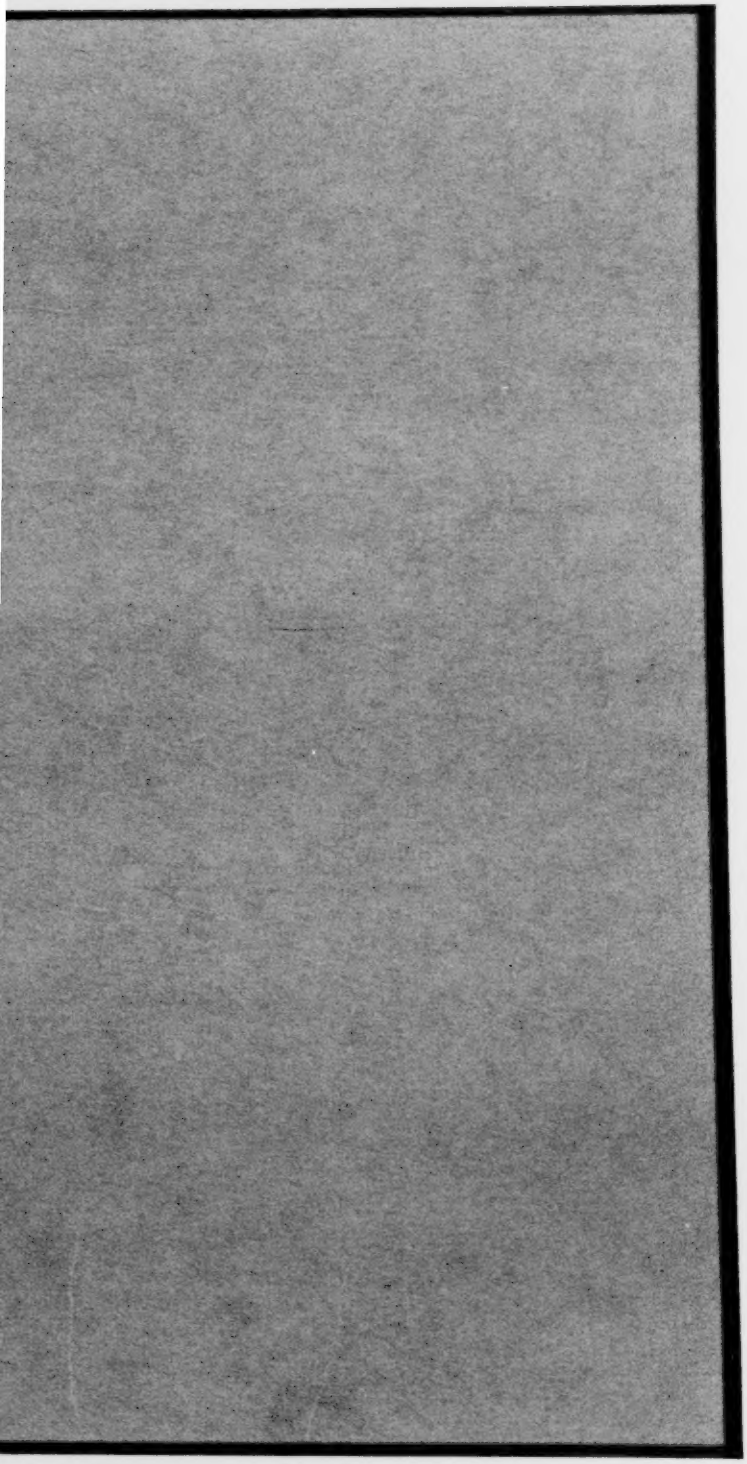
> *Kwock Jan Fat v. White,* 253 U. S. 454, 464;
> *St. Joseph Stock Yards Co. v. United States, et al.,* 298 U. S. 38, at pages 51 and 52.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them and each of them to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and proceedings of the said Circuit Court of Appeals in the said case lately pending therein, entitled "Kong Din Quong, Appellant, vs. Edward L. Haff, District Director of Immigration and Naturalization for the Port of San Francisco, Appellee, No. 9250", to the end that the decision and judgment of said Circuit

Court of Appeals may be reviewed as provided in 28 U.S.C., Sec. 347, and that your petitioner may have such other and further relief or remedy in the premises, as to this Court may seem appropriate and in conformity with said Act, and that the decisions and the judgments of the said Circuit Court of Appeals and of the Southern Division of the United States District Court for the Northern District of California, in the said case, and every part thereof may be reversed by this Honorable Court.

Dated: San Francisco, California,
October 15, 1940.

LAMBERT O'DONNELL,
STEPHEN M. WHITE,
Counsel for Petitioner.



Due service and receipt of a copy of the within is hereby admitted this_____day of October, 1940.

_____

Attorney for Respondent